SUPREME COURT, U. S.
IN THE
FILED
MAR 8 1971

Supreme Court of the United States

October Term, 1970
No. 1448

THE KLAGES COAL AND ICE COMPANY, d/b/a ROYAL CROWN BOTTLING COMPANY,

Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

CARL M. GOULD,
STANLEY E. TOBIN,
KYLE D. BROWN,
CHARLES G. ARMSTRONG,
445 South Figueroa Street,
34th Floor,
Los Angeles, Calif. 90017,
Attorneys for Petitioner,

JAMES C. HERNDON and
DAVID R. GEORGE,
HERNDON AND BARTLO,
Buchtel-Market Building,
680 East Market Street,
Akron, Ohio 44304,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Regulations Involved 2

Statement of the Case 3

A. The District Court's Findings of Fact 3

B. The District Court's Conclusions of Law and Judgment 5

C. The Decision of the Court of Appeals 6

Reasons for Granting the Writ 7

Conclusion 17

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Sixth Circuit 1-A

Appendix B. Findings of Fact and Conclusions of Law and Judgment and Final Order 17-A

Appendix C. Pertinent Statutory Provisions Involved 29-A

TABLE OF AUTHORITIES CITED

Cases	Page
Anderson v. Federal Cartridge Corp., 156 F. 2d 681	12
Cleo Syrup Corp. v. Coca-Cola Co., 139 F. 2d 416, cert. den., 321 U.S. 781	8
Federal Security Insurance Co. v. Smith, 259 F. 2d 294	8
Hadco Prods., Inc. v. Frank Dini Co., 401 F. 2d 462	8
Jewel Tea Co. v. Williams, 118 F. 2d 202	16
Resnick v. M & R Baking Company, Inc, 63 Labor Cases, para. 32,370	13
Skidmore v. Swift & Co., 323 U.S. 134	14
Smith v. James Irvine Foundation, et al., 402 F. 2d 772, cert. den., 394 U.S. 1000	9
Stacher v. United States, 258 F. 2d 112	9
United States v. Fotopulos, 180 F. 2d 631	9
United States v. Jones Beach Auth., 255 F. 2d 392	8
United States v. National Ass'n of Real Estate Boards, 339 U.S. 485	8
United States v. Yellow Cab Co., 338 U.S. 338	8
Walling v. General Industries Co., 330 U.S. 545	12
Wirtz v. Golden Creme Do-nut Co., 58 Labor Cases, para. 32,098	13, 16

Rules	
Federal Rules of Civil Procedure, Rule 52(a)	2, 7, 8, 13

Statutes	Page
Code of Federal Regulations, Title 29, Sec. 541.-500	6
Code of Federal Regulations, Title 29, Secs. 541.-500-541.508	2
Code of Federal Regulations, Title 29, Sec. 541.-505	16
Code of Federal Regulations, Title 29, Sec. 541.-505(a)	13
Code of Federal Regulations, Title 29, Sec. 541.-505(b)	13, 14
Code of Federal Regulations, Title 29, Sec. 541.-505(c)	14
Code of Federal Regulations, Title 29, Sec. 541.-505(f)(1)	15
Code of Federal Regulations, Title 29, Sec. 541.-505(f)(2)	15
Fair Labor Standards Act, Sec. 13(a)(1)	3, 6, 11, 13
Fair Labor Standards Act, Sec. 17	3
Fair Labor Standards Act of June 25, 1938, Ch. 676, 52 Stat. 1060	2
United States Code, Title 29, Sec. 201	2
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 29, Sec. 217	3

IN THE

Supreme Court of the United States

October Term, 1970
No. .....

THE KLAGES COAL AND ICE COMPANY, d/b/a ROYAL CROWN BOTTLING COMPANY,

Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor, United States Department of Labor,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

This is a petition by The Klages Coal and Ice Company, d/b/a Royal Crown Bottling Company, for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 10, 1970.

Opinions Below.

The opinion of the Court of Appeals in this case (App. A, *infra*, pp. 1a-16a) is currently only reported at 19 WH cases 829 and 64 L.C., para. 32,425. The opinion of the District Court for the Northern District of Ohio (App. B, *infra*, pp. 17a-28a) is currently only reported at 19 WH cases 201 and 61 L.C., para. 32,243.

Jurisdiction.

The judgment of the Court of Appeals for the Sixth Circuit was rendered and entered on December 10, 1970. See Appendix A, *infra*, page 1a. This Petition for Certiorari is filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the Circuit Court exceeded the permissible scope of appellate review under the "unless clearly erroneous" rule of F.R.C.P. 52(a) when it reweighed the evidence and reversed a factual finding of the District Court, which was clearly supported by the evidence, that Petitioner's route salesman employees perform duties which exempt them as "outside salesmen" from the overtime provisions of the Fair Labor Standards Act.

2. Whether a route salesman, who is concededly the only sales contact between his employer and its customers, may be deprived of the "outside salesman" exemption from the overtime pay requirement of the Fair Labor Standards Act solely because he may not have participated in obtaining a preliminary authorization to solicit such customers.

Statutes and Regulations Involved.

1. The Fair Labor Standards Act of June 25, 1938, ch. 676, 52 stat. 1060, as amended; 29 U.S.C. 201, *et seq*. The pertinent statutory provisions are set forth in Appendix C, *infra*, pp. 29a-30a.

2. Code of Federal Regulations, Title 29, §§541.500-541.508. The pertinent regulatory provisions are set forth in Appendix C, *infra*, pp. 30a-44a.

Statement of the Case.

On May 23, 1967, the Secretary of Labor brought this action against Petitioner under Section 17 of the Fair Labor Standards Act (hereinafter referred to as the Act) praying for a permanent injunction to enjoin Petitioner from alleged violations of the Act's overtime provisions, and to restrain the continued withholding of unpaid overtime compensation claimed to be due to certain employees of Petitioner classified as route salesmen (also sometimes referred to as "routemen" or "driver salesmen"). The basis for jurisdiction in the trial court was 29 U.S.C. §217.

After subsequent timely pleadings, this case was tried before the Honorable Thomas J. Lambros, United States District Judge, at Cleveland, Ohio, commencing on February 10, 1969. The District Court entered findings of fact and conclusions of law which sustained Petitioner's claim that its route salesmen were "outside salesmen" within the meaning of Section 13(a)(1) of the Act.

A. The District Court's Findings of Fact.

The District Court found that Petitioner is an Ohio corporation doing business as Royal Crown Bottling Company, which manufactures, bottles and sells soft drinks in the Akron, Ohio, area (App. B, *infra*, p. 18a). Petitioner currently employs nineteen route salesmen who, among them, account for ninety-five percent of Petitioner's total dollar volume of sales. Route salesmen make sales to three types of buyers: (1) independent food stores, (2) outlets of food chain stores, and (3) vending machine locations. Approximately sixty percent of Petitioner's total dollar sales volume results

from sales to chain store outlets [App. A, *infra,* p. 2a, App. B, *infra,* p. 19a; and R 81].[1]

The District Court found: that as to all three of the above accounts, the route salesman is the only sales contact between the Petitioner and its customers; vending machine locations and independent stores are contacted by the route salesman directly; and that although higher management initially contacts chain stores, this is simply for the purpose of obtaining written or oral authorization to solicit individual outlets of the chain. Authorization from a chain's main office does not permit or require an individual outlet to purchase any specific quantity of Petitioner's products, nor indeed, to purchase them at all. This decision is left solely to the individual store. The authorization of the chain is required for the singular purpose of controlling the variety and quality of products sold by the individual outlets (App. B, *infra,* pp. 23a-26a; R 29, 54-55, 151, 254-255).

There is no contractual prearrangement as to the amount of products to be purchased. It is solely left to the initiative and sales ingenuity of the route salesman to participate in the initial allocation of shelf space and to subsequently secure additional shelf space and space for promotional displays, and to increase the number of case displays in each store, through persuasion of store management [App. B, *infra,* pp. 23a-24a; R 143, 177, 188-189, 198-199].

The District Court further found, and it is undisputed, that route salesmen are characterized as "sales servicemen" or "driver salesmen" in their union's collec-

---

[1] "R" refers to the clerk's transcript of record in the Court of Appeals, while "TR" refers to the reporter's stenographic transcript of the trial proceedings in the District Court.

tive bargaining agreement with Petitioner; that Petitioner requires sales experience as a condition to employment as a routeman; provides sales training; holds regular (at least twice monthly and annual) sales conferences; conducts regular sales incentive contests awarding prizes for additional sales and obtaining new accounts; conducts advertising campaigns intended to help the routemen in their sales function; pays its routemen a flat fee plus commissions based on sales volume; and that sales of soft drinks is a highly competitive business in which route salesmen play a crucial role (App. B, *infra*, pp. 24a-27a).

The Court also found that differences in individual income are based on differences in aggressiveness and sales ability of routemen, and that routemen perform a regular, important sales function in soliciting and promoting additional business—directly by increased case sales and indirectly by setting up shelf material and other promotional displays (App. B, *infra*, pp. 26a-27a).

Finally, the Court found, contrary to the contention of the Government, that the routemen's sales to vending machines, assuming it to be non-exempt work, was so minimal as not to even approach the twenty percent statutory limitation on non-exempt work (App. B, *infra*, p. 28a).

B. The District Court's Conclusions of Law and Judgment.

Relying on each of the foregoing facts, the District Court concluded that the Petitioner's route salesmen are employed primarily for the making of sales, that they are customarily and regularly so engaged, that less than twenty percent of their time is devoted to non-exempt work, (*i.e.*, time not spent incidental to, or in

conjunction with their sales efforts) and, therefore, that the route salesmen are exempt as "outside salesmen" within the meaning of Section 13(a)(1) of the Act and of 29 C.F.R. Section 541.500, *et seq.*, the pertinent regulations (App. B, *infra*, p. 24a).

Accordingly, the Court denied the Government's request for an injunction, dismissed the Complaint and entered judgment in favor of Petitioner (App. B, *infra*, p. 28a).

C. The Decision of the Court of Appeals.

The sole question on appeal, as the Circuit Court acknowledged, was whether there was sufficient evidence to support the District Court's findings of fact as to the nature of the routemens' duties (App. A, *infra*, p. 1a). In reviewing those findings, the Court of Appeals gave lip service only to the rule that, "Findings of fact made by the District Judge in this regard may not be set aside unless they are clearly erroneous" (App. A, *infra*, p. 12a).

In reversing, the Court of Appeals held the evidence insufficient to establish the fact that Petitioner's route salesmen were entitled to the "outside salesman" exemption (App. A, *infra*, pp. 12a-13a). The Court of Appeals, contrary to the District Court, found with regard to chain stores, "no evidence that routemen participate in or influence the initial decision to buy or the volume of purchases" (App. A, *infra*, p. 13a). Although acknowledging that there was evidence that the routemen solicited additional shelf space from time to time, it reversed the District Court's finding that such evidence was significant, and found for itself that such solicitations were not sufficiently regular or frequent. While conceding that such Solicitations might otherwise be the

deciding factor, if other selling functions were also performed in the store, it found, again *contra* to the trial court, that there were no other in-store selling functions (App. A, *infra*, p. 14a).

Finally, the Court of Appeals held that the "cumulative effect of the other factors cited by the trial judge (enumerated by Petitioner in paragraph A of this section) is not sufficient to establish the exemption" (App. A, *infra*, p. 16a) and remanded the case to the District Court solely for determination of the relief sought by Plaintiff.

REASONS FOR GRANTING THE WRIT.

1. The first question presented herein, which is addressed to the proper function of a reviewing court, is of extreme importance because the decision of the Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The only proper issue which the Sixth Circuit had before it was whether there was sufficient evidence to support the finding of the District Court that Petitioner's routemen performed duties which exempted them as "outside salesmen" from the overtime provisions of the Act. This issue was improperly resolved by the Sixth Circuit which retried, reweighed and selected from the evidence—an impermissible function of an appellate court. In trying this case *de novo*, the Court manifestly invaded the province of the trial court and circumscribed the "unless clearly erroneous" rule as set forth in F.R.C.P. 52(a) and as explicated by this Court in prior decisions.

This court has succinctly stated its view of a reviewing court's role under Rule 52(a) in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949):

> "While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence* is not 'clearly erroneous.'" (Emphasis supplied).

And in *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 435, 495-496 (1950), the Court forcefully reiterated its conviction that simply because an appellate court might give the facts another construction or resolve ambiguities in a different fashion this provides absolutely no basis for setting aside a finding of fact as clearly erroneous.[2]

---

[2]This standard has been restated and applied in a myriad of circuit court decisions. See, *e.g. Federal Security Insurance Co. v. Smith*, 259 F. 2d 294 (9th Cir., 1958). (An appellate court may not substitute its opinion if reasonable men might differ on a conclusion); *United States v. Jones Beach Auth.*, 255 F. 2d 392 (2d Cir., 1958) (Even if appellate court would have reached a different result on the trial record, it cannot substitute its judgment for that of the trial court in the absence of clear error); *Hadco Prods., Inc. v. Frank Dini Co.*, 401 F. 2d 462 (3d Cir., 1968) ("It is settled that where evidence would sustain a conclusion either way and the trial court decided it to weigh more heavily for the defendant, that such a choice between two permissible views of the weight of evidence is not 'clearly erroneous' within the meaning of Rule 52"); *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F. 2d 416, 417-418 (8th Cir., 1943), *cert. den.*, 321 U.S. 781 (1944) ("This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court . . . In a non-jury case, this Court may not set aside a finding of fact of a trial court

The Court of Appeals purported to apply these standards in reaching its decision, but instead wrongly reweighed and retried the facts for itself. The following are prime examples of critical areas wherein the court patently exceeded its scope of review and reached erroneous "findings" of its own:

(a) Specifically, and as the *gravamen* of its determination, the Court of Appeals found "no evidence that routemen participate in or influence the intial decision to buy or the volume of purchases" in chain stores (App. A, *infra*, p. 13a). This assertion is completely erroneous and totally ignores the factual finding of the trial court that at times route salesmen have taken part in the initial allocation of space and the initial quantity purchased, which in turn was based upon the testimony given to that effect [R 52-55; 69-70; 126; 128; 142-143; 177; 189; 199]. Under the cases previously cited, the appellate court had no discretion to ignore and/or disbelieve this testimony.

(b) The Court of Appeals totally misapprehended the import and effect of the preliminary written or oral authorization issued by the chain stores to permit sales by Petitioner, and extrapolated from such authorization to find, "Thus, the routemen do not solicit orders and return with stock; they restock a volume requirement

---

unless there is no substantial evidence to sustain it . . ."); *Smith v. James Irvine Foundation, et al.*, 402 F. 2d 772 (9th Cir., 1968), *cert. den.*, 394 U.S. 1000 (1969) ("We are not to retry the issues of fact nor to supplant the district court's judgment with that of our own.")

In addition, Petitioner was entitled on appeal to all the favorable inferences which could be reasonably drawn from the facts which the trial court found and to have the evidence viewed in a light most favorable to it. When so viewed, if there is substantial evidence to support the judgment, it cannot be reversed. *Stacher v. United States*, 258 F. 2d 112 (9th Cir., 1958); *United States v. Fotopulos*, 180 F. 2d 631, 634 (9th Cir., 1950).

initially determined by the customer without their intervention" (App. A, p. 13a). This ostensible finding is not supported by any evidence and the only evidence given was to the contrary. In addition, the Court ignored both the instances where the route salesman does play an integral part in the initial determination, and the evidence presented that the route salesmen have sold products, and placed promotions, in chain store outlets without authorization of the home office of the chain. Thus, on a pivotal factual point, the Circuit Court made findings which are without support in the evidence while implicitly reversing findings which have substantial evidentiary support [R 52-55; 69-72; 126; 128-129; 142-143; 153-154; 177; 189; 212-216; TR 293; 475; 491; 515-517; 522; 651-654].

(c) The Court of Appeals held that solicitations for additional shelf space by the route salesmen were the only selling activity performed in the stores (App. A, *infra*, p. 14a). Again, the Court of Appeals totally disregarded the fact finding of the District Court which was based upon substantial testimony that other selling functions in a store include: obtaining orders from stores for every bottle of beverage sold in each store; obtaining display space and constructing displays; placing "point-of-purchase" advertising materials in the retail outlets; selling the store manager on promotional activities; and maintaining a rapport with the various store managers for the purpose of increasing future sales [App. B, *infra*, pp. 23a-27a; R 42, 44-45; 50-55; 57-58; 69-72; 114-115; 126;128; 135-139; 142-143; 161-162; 189; 203; 221-216; 219; 222; 298-299; TR 475; 491; 515-517; 651-654].

(d) The Court of Appeals overturned the finding of the trial court that differences in the earnings of the

routemen were attributable to differences in aggressiveness and sales ability by improperly discrediting the testimony of the only witness to the point (App. A, *infra*, p. 16a; App. B, *infra*, p. 26a).

(e) Although the reviewing court had no dispute with the trial court's findings that the sale of carbonated beverages is a highly competitive business and that the route salesmen are the *only* sales contact between the store and Petitioner, it nevertheless concluded, in essence, that this sales contact was meaningless because the customer sold himself. This is completely contrary to substantial evidence in the record upon which the District Court grounded its finding [App. B, *infra*, pp. 26a-27a; R 126; 42, 44-45; 50-55; 57-58; 69-72; 114-115; 128; 135-139; 142-143; 161-162; 189; 203; 212-216; 219; 222; 298-299; TR 475; 491; 515-517; 651-654].

(f) Enigmatically, the Court of Appeals gave no weight at all to the numerous other factors which cumulated, in the view of the trier of fact, to underscore the *exempt* status of these employees (App. A, *infra*, p. 16a; App. B, *infra*, pp. 23a-27a) (*e.g.*, the denomination in the collective bargaining agreement of the routemen as "salesmen", testimony that differences in earnings were attributable to differences in aggressiveness and sales ability, mandatory attendance at regular sales meetings together with all those additional items previously cited in sections 1(c) and 1(e) above).[3] [R

[3]The question of vending machine accounts serviced by driver salesmen, and whether such time was exempt or exceeded the twenty percent limitation on non-exempt work set forth in Section 13(a)(1) is not relevant to this Petition in view of the Circuit Court's holding that it will remand that issue for a new trial if Petitioner's drivers are found to have otherwise qualified for the exemption (App. A, *infra*, pp. 15a-16a).

(This footnote is continued on the next page)

61-65; 113-124; 201-203; defendant's trial Exhibits A-T].

In summary, as illustrated by the examples cited above, the Circuit Court clearly invaded the province of the trial court in imposing its own largely unsupported construction of the facts on this case. There can be no question that one's status as an exempt employee is a finding of fact which is based upon a determination of the character of an employee's duties. *Anderson v. Federal Cartridge Corp.*, 156 F. 2d 681 (8th Cir., 1946). There is precedent wherein this Court has granted certiorari to reverse a Circuit Court which improperly exceeded its scope of review in overturning a trial court finding that employees are entitled to exemption under the Fair Labor Standards Act. In *Walling v. General Industries Co.*, 330 U.S. 545 (1946), this Court reversed a circuit which, in turn, had overruled the findings of fact of a district court that certain employees were entitled to the Act's executive exemption, stating:

> "We believe that the evidentiary facts afforded an adequate basis for the inferences drawn by the [trial] court in making such additional findings. At the least, we think that in drawing such inferences the court was not clearly wrong, and conclude that the findings should therefore have been left undisturbed."

The situation is particularly aggravated in cases involving Fair Labor Standards Act exemptions in which

---

However, it is to be noted that the Circuit Court found that the Petitioner did not sustain its burden of proof in showing that non-exempt activities did not exceed amount permissible statutory limits (App. A, *infra*, p. 16a).

Yet the only evidence on the record supports the fact that the time devoted to vending machine activity was conclusively well within allowable tolerances for the exemption [App. A, *infra*, p. 15a; App. B, *infra*, p. 28a; R 187-188; 229; 232; 326].

many thousands of dollars of potential backpay liability hinge upon close factual distinctions concerning the numerous duties of "grey area" employees. Illustrative of Petitioner's contention that fact determinations are of paramount importance in this area, is the case of *Wirtz v. Golden Creme Do-nut Co.*, 58 Labor Cases, para. 32,098 (D.C., Colo., 1968) in which the district court found the outside salesmen exemption to apply to route drivers of a bakery company possessing virtually the identical duties of the employees in the instant case. See also *Resnick v. M & R Baking Company, Inc.*, 63 Labor Cases, para. 32,370 (D.C. N.Y., 1970). Not only did the circuit court ignore these precedents, but the fact that three federal trial courts have reached the same conclusion on similar facts strongly suggests the wisdom of the policy of F.R.C.P. 52(a) which compels deference to the factual determinations of trial courts, rather than "retrial" by a circuit court based on the cold record.

2. The second question presented herein raises an important question of federal law which has not been, but should be, settled by this Court. That question is whether employees who are concededly the *only* sales contact between their employer and its customers and who personally consummate virtually all of their employer's total dollar volume of sales may be deprived of the Section 13(a)(1) "outside salesman" exemption from the overtime requirements of the Act.

Petitioner's driver-salesmen obtain orders for (*i.e.* "sell"; see Regulation 541.505(a), (b); App. C, *infra*, pp. 36a-38a) every single bottle of soft drink which is purchased by independent or chain store customers on their respective routes. The trial court so found and the circuit court conceded the point (App. A, *infra*, pp. 5a-

6a, pp. 12a-15a; App. B, *infra,* pp. 23a-27a). It is further conceded by everyone that the routeman is compensated by Petitioner commensurate with the volume of products sold, *i.e.,* by commission based on sales (App. A, *infra,* p. 11a; App. B, *infra,* p. 26a).

The Wage & Hour Administrator, who has been invested with broad discretion to define and delimit the scope of the exemption, has interpreted this identical set of facts to require exemption. This interpretation is entitled to great weight. *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). Section 541.505(b) declares:

> "Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle . . . and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales."

The Circuit Court cast aside this "purple cow" example and instead found Section 541.505(c) to be controlling. That section denies exemption to one who:

> ". . . delivers orders *to customers to whom he did not make the original sale* in amounts which are exactly or approximately prearranged by customer or contractual arrangement. . . ." (emphasis added).

The fatal flaw in the Court's reasoning is that *the driver salesmen do in fact make the original sale and every sale thereafter to every single customer* (emphasis added). [App. B, *infra,* pp. 23a-27a; R 42, 44-45; 50-55; 57-58; 69-72; 114-115; 126; 128; 135-139; 142-143; 161-162; 189; 203; 212-216; 219; 222; 298-

299; TR 475; 491; 515-517; 651-654]. Thus, Section 541.505(c), by its own express terms, is totally inapplicable.[4]

With respect to chain store sales, the driver salesmen admittedly do not participate in obtaining from the home office of the chain the written or oral authorization which permits its individual outlets to consider the purchase of Petitioner's products. But the solicitation of such an authorization is not the making of "sales", as the Circuit Court concedes (App. A, *infra,* p. 13a), because no reail chain outlet, although permitted by the authorization to do so, is required to purchase Petitioner's product at all. The obtaining of actual orders for (*i.e.,* "sales" of) Petitioner's soft drinks is the sole duty of the driver salesmen.

The anomalous result of the Sixth Circuit's erroneous application of the law is that Petitioner, whose entire business is devoted to the production and sale of its beverage products, has no employee who qualifies for the "outside salesman" exemption. Surely, such a legal result must be reconsidered and reversed if the exemption, as intended by Congress, is to have any viability whatsoever.

The legal issue here presented is of critical national significance because Petitioner's sales operation is substantially identical to that of a vast number of companies, many known as "rack jobbers," who distribute and sell through driver salesmen, food and non-food items to supermarkets and other outlets throughout the country.

---

[4]However, Sections 541.505(f)(1) and (2) of the Regulations exempt even a routeman who regularly delivers prearranged amounts if, as here, he makes efforts to take increased orders of the prearranged products, solicits orders for other products and solicits new customers.

This entire industry in recent years has been subjected with increasing regularity to administrative investigation and court action which together have resulted in diverse decisions ranging from a finding of violation to a finding of exemption. *Cf. Wirtz v. Golden Creme Do-nut Company, supra.* In 1965 the situation became so intolerable as to cause the Wage & Hour Administrator to hold hearings, based upon which he "amplified" the driver salesman regulations of 29 C.F.R. 541.505, *et seq.*[5] Such "amplification", Petitioner submits, rather than serving the purpose of clarification, merely added to the existing contradiction and confusion in the area.

As recently as February 1971 the Administrator conducted further hearings relative to a proposal to add an earnings test to the outside salesman exemption, in part an effort to delimit the "grey areas" inherent in applying the exemption.[6] The present lack of uniformity and rational guidelines will only continue to foster confusion and instability affecting the sound and efficient operations of Petitioner and similarly situated companies. The erroneous decision of the court below only serves to further aggravate the situation and to nullify the purpose and intent of Congress when it added the outside salesman exemption to the Act.[7] The time

---

[5]See Federal Register June 22, 1965.

[6]See Federal Register November 6, 1970.

[7]The objective of Congress in establishing the exemption was enunciated in *Jewel Tea Co. v. Williams,* 118 F. 2d 202, 207-208 (10th Cir., 1941):

> "The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra

is ripe for this Court to review the scope of the exemption, to establish meaningful guidelines, and to put an end to the confusion and contradiction which surrounds the exemption.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

HILL, FARRER & BURRILL,
By CARL M. GOULD,
STANLEY E. TOBIN,
KYLE D. BROWN,
CHARLES G. ARMSTRONG,
Attorneys for Petitioner.

JAMES C. HERNDON and
DAVID R. GEORGE,
HERNDON AND BARTLO,
Of Counsel.

---

compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman."

APPENDIX A.

Opinion of the United States Court of Appeals for the Sixth Circuit.

United States Court of Appeals, for the Sixth Circuit. No. 20241.

James D. Hodgson, Secretary of Labor, United States Department of Labor, *Plaintiff-Appellant,* v. The Klages Coal and Ice Company, d/b/a Royal Crown Bottling Company, *Defendant-Appellee.*

On Appeal from the United States District Court for the Northern District of Ohio.

Decided and Filed December 10, 1970.

Before: Weick, McCree, and Miller, Circuit Judges.

Miller, Circuit Judge. Appellant, the Secretary of Labor, brought this action pursuant to Section 17 of the Fair Labor Standards Act, 29 U.S.C. §§201, 217 to enjoin appellee from violating the overtime requirements of the Act and to restrain continued withholding of unpaid overtime compensation to twenty-eight of its present and former employees. Appellee contended at trial that the employees in question came within the exception to the overtime requirement contained in Section 13(a)(1) of the Act, 29 U.S.C. §213(a)(1) for "outside salesmen." After a full hearing, the District Court held that the employees were "outside salesmen" within the meaning of 29 U.S.C. §213(a)(1) and the regulations issued pursuant thereto, 29 C.F.R. §541.500 et seq. and dismissed the appellant's action. The question on appeal is whether there is sufficient evidence to support the finding of the District Court.

Appellee is a franchised bottler and distributor of products of the Royal Crown Bottling Company serving a four-county area in Ohio with its principal place

of business in Akron, Ohio. The products marketed by appellee include Royal Crown Cola, Diet-Rite, Lemon-Lime, and Nehi flavors, all in both bottles and cans. During the years pertinent hereto,[1] appellee's customers increased from about 1300 customers to a present total of 1375. About five per cent of appellee's total dollar volume consists of sales made directly to another bottler and to several wholesale vendors. Approximately ninety-five per cent of appellee's annual dollar volume consists of sales made to chain store retail outlets, independent retail outlets, and vending machine locations. Of these sales, approximately 60 per cent of total dollar volume is attributable to chain store retail outlets. The servicing of the chain and retail outlets, as well as the vending machine locations, is the function of appellee's routemen or drivers.[2]

Appellant has maintained throughout that the routemen are ordinary drivers or deliverymen entitled to be paid time and one-half their regular rate for hours worked per week in excess of forty. Appellee successfully maintained below that these routemen were engaged in sales as "outside salesmen" and thus exempt from the overtime requirement of the Act.

---

[1]The complaint was filed on May 23, 1967, and alleged violations of 29 U.S.C. § 7(a)(1) and 15(a)(2) since September 11, 1964. A stipulated amendment was made on February 14, 1969, to include alleged violations from May 23, 1967 until February 1, 1969.

[2]In the pleadings, at trial, and on appeal, the parties have characterized the employees in question in conclusory fashion, appellants calling them "drivers" or "deliverymen," the appellee denominating them "salesmen." The Court will use the neutral term "routemen."

The exemption sought by appellee is found in 29 U.S.C. § 213(a)(1), which provides:

> SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to—(1) any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)."

The most current regulations issued by the Secretary to define and delimit those employees who are entitled to be exempt under this section of the Act are found in 29 C.F.R. §§541.500 et seq. Section 541.500 of the regulations provides:

> *Sec. 541.500* Definition of "Outside Salesman". —Section 541.5 defines the term "outside salesman" as follows:
>
> The term "employee employed * * * in the capacity of outside salesman" in Section 13 (a) (1) of the act shall mean any employee:
>
> (a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:
>
> (1) making sales within the meaning of section 3(k) of the act, or
>
> (2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (b) whose hours of work of a nature other than that described in paragraph (a) (1) or (a)

> (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as non-exempt work.

In addition, subsection 541.505 deals in detail with the problem presented by this case, namely that of drivers who, in servicing their routes, perform both delivery and sales functions. Pertinent parts of this section of the regulations will be set forth below. At this point the section pertaining to the 20 per cent limitation on non-exempt work should be noted:

> Nonexempt work in the definition of "outside salesman" is limited to "20 per cent of the hours worked in the work-week by nonexempt employees of the employer." The 20 per cent is computed on the basis of hours worked by nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside salesman. If there are no employees of the employer performing such nonexempt work, the base to be taken is 40 hours a week, and the amount of nonexempt work allowed will be 8 hours a week. 29 C.F.R. §541.507.

It is conceded by both parties that under this section eight hours per week per man is the proper figure for nonexempt work.

Because the controversy is concerned so directly with the nature of the routemen's work, it is appropriate at this point to describe briefly the appellee's distribution operation and the activities of the routemen. The

discussion will center on the servicing of the retail chain store outlets because this part of the operation accounts for both the bulk of appellee's sales and the major part of the routemen's work.

So much of the facts as may be stated to be undisputed are as follows. Initially, in a newly opened retail store or in a new account, the store manager must receive permission from the chain's central office in order to carry appellant's products. Permission takes the form of an authorization letter from the central office to the store manager. In the case of a newly opened store, appellee's route manager or sales manager would contact the chain's central office to solicit the authorization letter for the store. This same procedure seems to be followed in the case of placing new products in established outlets. The authorization letter does not obligate the store manager to buy any goods. Once authorized, the store manager must decide whether he desires to carry the authorized products, and if so, he must allocate the shelf space to be stocked with the new products. He must also contact the appellee's management, which will then assign the store to a route.

Once the product is established, the routemen's function inside the store ordinarily is to survey the shelves allocated to his products, determine how many cases would be needed to refill them, and then restock the shelves accordingly from the stock carried on his truck. In some cases the routeman loads the shelves himself, in others he leaves the stock in the aisles to be shelved by the store's employees. The routeman would then prepare an invoice for the stock delivered and receive payment. In addition, the routeman must sort and create the empties returned to the store for deposit. Most

routemen of some experience seem to have a good idea of how much stock will be needed for the calls of a particular day and would make up an order for the stock to be placed on his truck by other employees the preceding night. He would also carry an extra supply of beverage for any special promotional displays he hoped to place in a store. The placement of additional stock for promotions connected to appellee's advertising was also handled on the basis of an authorization by the store's central office and often depended on the volume of sales of the product and the availability of additional space.

The main points of alleged error on the part of the trial court urged by appellant have to do with the court's evaluation of the evidence presented on three issues: (1) whether there was a prior contractual arrangement for the purchase of beverages between the appellee and any retail chain outlet; (2) whether the routeman fulfilled any significant sales function; and (3) whether the servicing of vending machines was nonexempt work, and, if so, whether the time so spent came within the 20 per cent tolerance allowed by 29 C.F.R. §541.500 ( ) and 541.507, *supra*. These several issues are, of course, made pertinent by the regulations to the one central issue whether the employees were "outside salesmen."

Various parts of 29 C.F.R. §541.505, a detailed regulation entitled, "Driver salesmen," have been cited by each party as support for its view of the contested factual determinations made by the trial judge. The focus of this regulation is on drivers who are engaged in a sales function. Although such men must be brought within the general rules of 29 C.F.R. §541.500 to be exempt from the overtime requirements, section 541.505

sets forth particular factors which the Secretary has determined to be helpful in analyzing whether an employee with such mixed duties is an "outside salesman."

Section 541.505(a) reiterates in more specific terms the requirement that the routeman must be a salesman by profession, engaged regularly and customarily in making sales.

> SEC. 541.505. (a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by §541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the Act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in §541.5. He must be a salesman by oc-

> cupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

Paragraph (b) of this subsection discusses the function of the routeman possessing mixed selling and delivery functions with still greater particularity, citing as an example employees of "distributors of carbonated beverages." As a plain example of such an employee who is engaged in making sales, the regulation states:

> Thus, there is little question that a routeman who provides the only sales contact between employer and the customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customers on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. 29 C.F.R. §505(b).

Appellees contend that this language is a description of the function of the routemen in the bulk of their work, servicing the retail chain store accounts, while appellant argues that the controlling language may be found in paragraph (c), which provides in part:

(c) One source of difficulty in determining the extent to which a route driver may actually be engaged in "making sales" arises from the fact that such a driver often calls on established customers day after day or week after week, delivering a quantity of his employer's products at each call. Plainly, such a driver is not "making sales" when he delivers orders to customers to whom he did not make the initial sales in amounts which are exactly or approximately prearranged by customer or contractual arrangement or in amounts specified by the customer and not significantly affected by solicitations of the customer by the delivering driver. Making such deliveries, as well as recurring deliveries the amounts of which are determined by the volume of sales by the customer since the previous delivery rather than by any sales effort of the driver, do not qualify the driver as an outside salesman nor are such deliveries and the work incident thereto directly to the making or soliciting of sales by the driver so as to be considered exempt work.

The contrasting language of this paragraph states:

On the other hand, route drivers are "making sales" when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit the customer for purchases. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods is likewise engaged in sales activity and is making sales to those from whom he obtains a commit-

ment. Also, a driver salesman calling on established customers on his route, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. Work which is performed incidental to and in conjunction with such sales activities will also be considered exempt work, provided such solicitation of the customer is frequent and regular. Incidental activities include loading the truck with the goods to be sold by the driver salesman, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

The trial court, although not finding the evidence to present a border-line case, nevertheless devoted the bulk of its opinion to an analysis of paragraph (e), which provides:

> (e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truck drivers and (2) salesmen; possession of a salesman's or solicitor's

> license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs nonexempt work in excess of the amount permitted by §541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.

Specifically, the trial court found that there was no contractual prearrangement for either quantities or specific products between appellee's management and the management of any chain store or its central office. The court further found, and it is undisputed, that the routemen are characterized as "Sales Servicemen" or "Driver Salesmen" in their union's collective bargaining agreement with the appellee. In addition, the court found that the appellee required sales experience as a qualification for a routeman, provided sales training and held regular sales conferences, paid its routemen a flat fee plus commissions based on volume, and that differences in incomes were based on differences in aggressiveness and sales ability of the routemen. Finally, the court found as a fact that the routemen performed a regular, important sales function in soliciting more shelf space and placing promotional materials and displays. It was further found that less than 20 per cent of the working hours of the routemen is spent

in nonexempt work. The ultimate conclusion, therefore, was that the appellee's routemen were "outside salesmen" within the meaning of 29 U.S.C. §213(a)(1) and thus exempt from the overtime requirement.

An employer seeking an exemption from the overtime requirements of the Act under 29 U.S.C. §213(a)(1) must prove that each employee is entitled to the exemption by plain and unmistakable evidence. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960). Exemptions must be limited to those falling expressly within the statute. *Wirtz v. Lunsford*, 404 F.2d 693, 697 (6th Cir. 1968). Whether employees are exempt from the requirements of the Act is primarily a question of fact. *Walling v. General Industries Co.*, 330 U.S. 545, 550 (1947). Findings of fact made by the District Judge in this regard may not be set aside unless they are clearly erroneous. *Walling v. General Industries Co., supra; Wirtz v. Atlanta Life Ins. Co.*, 311 F.2d 646 (6th Cir. 1963). Applying these standards, and giving some weight to the requirement of 29 C.F.R. §541.505(a) that "all the facts bearing on the content of the job as a whole" must be considered, in addition to the requirement of the regulations that "the employee may qualify as . . . [an] outside salesman if, and only if, the facts clearly indicate that he is customarily and regularly engaged in such activity," we hold that the finding of the District Court on the issue of exemption was clearly erroneous.

Although some of the factors set forth by the regulations for consideration were present in the evidence, the general conclusion of the District Court that the routemen were "outside salesmen" is not supported by the total circumstances presented. Aside from evidence that the routemen attended sales meetings and

often had prior sales experience of some sort, the finding that the routemen "customarily and regularly" engaged in making sales is lacking in evidentiary support. The trial court and appellee emphasized the fact that no sales contracts were made by appellee's management and the managers of the retail outlets. We note, however, that appellee's sales manager made the initial solicitation for an authorization letter from the chain home office allowing a store manager to stock appellee's products. The initial decision to carry appellee's products in any store is made by the store manager who allocates the shelf space to be given to appellee's products. There is no evidence that routemen participate in or influence the initial decision to buy or the volume of purchases. The evidence shows that the bulk of the routemen's time in servicing the retail chain accounts, which amount to 60 per cent of appellee's annual dollar volume, consists essentially of restocking the shelves and removing empties on a regular weekly basis in each store on the route. The familarity of most drivers with the probable needs of each store on their routes enables them to stock their trucks accordingly in advance of calling on the stores. Thus, the routemen do not solicit orders and return with stock; they restock a volume requirement initially determined by the customer without their intervention. While there may not be "prior contractual arrangements" between appellee and the stores in a strict sense, it still may be accurately stated that the routemen are "delivering orders to customers to whom [they] did not make the initial sale in amounts which are exactly or approximately prearranged *by customer or* by contractual arrangement. . . ." 29 C.F.R §541.505(c) (emphasis added).

There is evidence for appellee that the routemen solicited additional shelf space in the stores from time to time, a factor found by the trial court to be significant in finding that the routemen performed a sales function. The Court has reviewed all the testimony of the routemen on this point and does not find that such solicitations were sufficiently regular or frequent to justify classifying the routemen as "salesmen." Solicitations would be an important, perhaps deciding factor, were other selling functions performed in the stores; standing as the only selling activity performed in the stores, however, the evidence of irregular and infrequent requests for more space is an important factor in this case refuting the idea that the routemen were engaged as salesmen. Moreover, there was no evidence that such solicitations ever affected a significant increase in sales to a store independently of significant increases in consumer demand for appellee's products or the presence of an advertising promotion authorized by the chain which required additional stock. The trial court's finding that doubling shelf space triples sales was based on a generality of the trade recited by a witness for appellee and did not reflect any actual experience of a routeman or a customer of appellee so far as the present record discloses.

Other evidence shows that routemen attempt to obtain new customers along their routes. Appellee's accounts grew by about 75 outlets of all types in the last five years, but it was not shown to what extent such increases were attributable tothe efforts of routemen. In any case, any prospective new retail chain customer has to receive authorization from its central office to carry a new product, and this authorization is in all cases obtained by appellee's management from the central office. Thus, the fact that routemen make stops

to seek new customers cannot be considered the making of sales since the store manager alone cannot enter a binding agreement to carry the products. Even if such activity were considered the making of sales, it was not shown to be of such regularity or frequency in relation to the delivery and stocking activities as to render the routemen salesmen. Finally, it cannot be said on the evidence that the regular job of the routemen was to open up new accounts.

A second error in the opinion below alleged by the appellant is the finding respecting the servicing of vending machines. The court below found that this work, even if considered to be nonexempt work, did not exceed the 20 per cent limitation. Servicing vending machines has been held to be nonexempt work when it constituted the bulk of an employee's time. *Wirtz v. Dr. Pepper Co.*, 53 L.C. 31,797, 17 W.H. Cases 343 (N.D. Tex. 1966). Upon review of the testimony on this issue, the Court finds that the appellee did not carry its burden of proof. Section 213(a) does not provide a class exemption; appellee was required to show that each routeman for whom it sought an exemption spent less than 20 per cent of his working hours per week in servicing vending machines. The main evidence adduced was the testimony of one routeman who stated that he spent about fifteen minutes per week on vending machines. There are 163 vending machine accounts, however, and evidence from route books show that for some routemen such locations constituted 15 or 20 per cent of their accounts. The evidence, in sum, was insufficient to demonstrate the amount of time spent by each routeman on his vending machine accounts per week, or that the time spent came within the 20 per cent tolerance. We think it was clear error for the trial judge to treat, in effect, such work as a de

minimis factor in analyzing the functions of the routemen. In view of our holding that the other evidence in the case did not establish the exemption, however, the Court finds no reason to remand for a new trial to determine whether the time spent in servicing vending machines was within the 20 per cent limitation.

Finally, the cumulative effect of the other factors cited by the trial judge is not sufficient to establish the exemption. For example, the fact that the routemen were denominated "salesmen" in their collective bargaining agreement is inconclusive. The finding that differences in earnings of the routemen were attributable to differences in aggressiveness and sales ability was based solely on an unsubstantiated opinion of a witness for appellee and did not take into account differences in the size and quality of routes. Mandatory attendance at sales meetings held by the appellee likewise is inconclusive. The sum of all these factors does not, we think, overcome the view we take of the function of the routemen inside the store, which from this record, appears to us primarily and regularly to be delivering inventory and restocking shelves in amounts determined in the first instance by the customer at locations usually first obtained by appellee's management employees. Therefore, the finding that the routemen were entitled to be exempt from the overtime requirements is reversed and the action is remanded to the District Court for determination of the relief to which the appellant is entitled in accordance with the provisions of the Fair Labor Standards Act and consistent with the conclusion herein that the exemption of the affected employees as "outside salesmen" is not established.

Reversed and remanded.

APPENDIX B.

Findings of Fact and Conclusions of Law and Judgment and Final Order.

United States District Court, Northern District of Ohio, Eastern Division.

George P. Schultz, Secretary of Labor, United States Department of Labor, Plaintiff v. The Klages Coal and Ice Company, a corporation, doing business as Royal Crown Bottling Company, Defendant. No. C 67-362.

Lambros, J.:

The Court finds that the route-salesmen employed by the defendant are "outside salesmen" within the meaning of section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. §201 *et seq.*) (hereinafter the "Act") and of section 541.500 of the regulations promulgated thereunder (see 29 C.F.R. §541 *et seq.*). Thus, these employees are exempt from the overtime provisions of the Act. This finding is made after a thorough evaluation of the evidence submitted in this case, particularly in reference to the contents of the work performed by the route-salesmen. The route-salesmen not only can be classified as salesmen but, indeed, they are actively engaged in a sales function. To impose the overtime provisions of the Act to these employees, would have a detrimental effect on the highly competitive nature of the beverage industry. These route-salesmen play active and key roles in this competition. The commissions paid for the quantity of beverages sold provide an incentive to increase the number of accounts and to enlarge the amount of beverages sold at any one location. The sales function performed by the route-salesmen would be severely hindered if they were paid on a straight salary basis. The govern-

ment inappropriately sought to classify these route-salesmen as truck drivers. The Court finds that contrary to the government's contention, the evidence overwhelmingly reflects that these route-salesmen do in fact perform a sales function in over eighty percent of their work.

The plaintiff in this action seeks to enjoin and restrain the defendant, its officers, servants, agents and employees from further violating the overtime provisions (sections 7 and 15(a)(2)) of the Act. Furthermore, the plaintiff seeks to restrain the defendant from withholding payment of unpaid overtime compensation due under the Act to the defendant's employees in the classification of route-salesmen.

The defendant is an Ohio corporation, doing business as Royal Crown Bottling Company, with its main office and place of business in Akron, Ohio. In response to the plaintiff's contentions, the defendant offers two defenses. First, the defendant alleges that the route-salesmen in this case are exempt from the provisions of the Act inasmuch as they are "outside salesmen" within the meaning of section 13(a)(1) of the Act. Second, the defendant claims that if there was any violation of the Act, such violation was not wilful. Thus, under the applicable provisions of the Portal-to-Portal Pay Act of 1947 (29 U.S.C. §251 *et seq.*), the defendant claims that the two year statute of limitations applies.

In order to understand the issues raised in this case, it would be helpful to describe the defendant's business and the function of the route-salesmen in relation thereto. The defendant manufactures, bottles and sells a beverage known as "Royal Crown Cola" and other related beverages under a franchise arrangement with the Royal

Crown Cola Company of Columbus, Georgia (hereinafter the "parent") in the Akron area. The defendant employs approximately forty-seven employees. Nineteen of them are route-salesmen. Approximately ninety-five percent of the total dollar volume of sales of the defendant are made through route-salesmen. The route-salesmen, in turn, make sales to three types of buyers—*i.e.* 1. to independent food stores, 2. to outlets of food chains, 3. t ovending machine locations. Approximately sixty percent of the total dollar sales volume emanates from the chain store outlets. With respect to these chain store outlets, the issue of whether these route-salesmen are "outside salesmen" is centered. A brief discussion of the law in this area seems appropriate.

Pursuant to the authority granted to the Secretary of Labor under §13(a)(1) of the Act, the Secretary has promulgated regulations with respect to the definition of "outside salesmen". In particular, the Secretary of Labor under 29 C.F.R. §541.500 has defined the term "outside-salesmen" in the following manner:

> "The term 'employee employed * * * in the capacity of outside salesman' in section 13(a)(1) of the act shall mean any employee:
>
> (a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:
>
> (1) Making sales within the meaning of section 3(k) of the act;
>
> (2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (b) Whose hours of work of a nature other than that described in paragraph (a) (1) or (a)(2)

of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work."

In reference to driver salesmen, the Secretary of Labor has promulgated the following regulation:

"(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by §541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the Act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the defi-

nition in §541.5. He must be a salesman by occupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling element." 29 C.F.R. §541.505 (a).

Although this Court feels that this case is not a borderline one, the regulations suggest that in a close case the following factors should be delved into. In pertinent part, the regulation reads:

"Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truck drivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable

to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work." 29 C.F.R. §541.505 (e).

The plaintiff claims that the route-salesmen are employed primarily for service and delivery duties rather than sales. In support of this contention, the plaintiff alleges that the route-salesmen just fill in the allotted space for their products in the chain and independent stores. The work in reference to the vending machines does not involve a sales function. In opposition, the defendant claims that the route-salesmen do in fact perform a sales function and are customarily engaged in such sales effort and their non-exempt work does not exceed the twenty percent limitation of 29 C.F.R. §541.500. In particular, the defendant claims that the route-salesmen do more than fill the allotted spaces. It alleges that the route-salesmen try to persuade the sales manager to buy more products and to increase the space allocations. The route-salesmen set up displays. The route-salesmen have sales training. These and other considerations which shall be further discussed, all demonstrate that route-salesmen are truly engaged in the making of sales.

Before proceeding to the findings with respect to these contentions, the Court notes that:

1. This Court has jurisdiction over this case under 29 U.S.C. §217.

2. The parties have stipulated that the defendant has been an "enterprise" within the meaning of sections 3(r) and 3(s) of the Act from January 1, 1965.

With respect to the determination of whether the route-salesmen were engaged in a sales function, the Court will follow the relevant guidelines outlined in 29 C.F.R. §541.505(e):

1. *The presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered.*

a. Prior to the solicitation of a new chain store outlet, a representative of the defendant, either the sales manager or route manager, contacts the home or central office for the individual chain store. The main office of the chain is never contacted by the route-salesmen. If the chain approves the product or promotional activity, an authorization letter is given the defendant, and upon occasion, verbal authorization is given. In turn, the chain sends a bulletin to its respective retail outlets advising them of the defendant's products which the store *can* purchase or of the promotional activity in which the store *can* participate. The authorization letter or bulletin does not contain any order that the individual store must purchase a specific quantity of the defendant's products nor does it contain an amount to be delivered nor any specific amount of space to be given to the defendant's products. The authorization is used only to control the number and quality of the various items purchased by the retail stores.

b. In the store itself, each beverage bottler is given an initial allocation of shelf or cooler space. At times, the route-salesmen of the defendant have taken part in this initial allocation of space. Thereafter, it is left up the the store manager's discretion whether the space allocations are to be

changed and the amount of the product to be purchased. He also has discretion in the determination of the size and location of any case display in a promotional activity.

c. The route-salesmen, in turn, try to encourage the store manager and, in some instances, have succeeded in having the space allocated to the defendant's products increased. This increase in space is crucial since it has been the experience in the soft drink industry that if the space is doubled, business is tripled. Furthermore, the route-salesmen try to cajole the sales manager in giving them extra case displays.

d. Thus, there appears to be no prearranged agreement as to the amount to be purchased. Rather, it is left up the route-salesman's own initiative to increase shelf space and to increase the number of case displays. The Court finds that it is not the route-salesman's primary function to refill the space allocated to defendant since the last delivery. Rather, his sales technique plays a great role in attempting to increase shelf space or to increase the number of case displays.

2. *The description of the employee's occupation in union contracts.*

a. In the collective bargaining agreements entered into between the defendant and the bargaining representative of the route-salesmen, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the route-salesmen have been referred to as *"Sales Servicemen" or "Driver-Salesmen"*.

3. *The employer's specifications as to qualifications for hiring.*

a. The defendant requires that the route-salesmen have sales experience. If an applicant does not have sales experience, the defendant tests the applicant for sales aptitude. The defendant also observes if the applicant is articulate and has initiative, the traits of a salesman.

b. Of the twenty-eight route-salesmen hired since January 1, 1965, twenty-three of them had previous sales experience.

4. *Sales training.*

a. The defendant provides extensive sales training to the route-salesmen. The men are taught the manner of obtaining additional shelf space, of procuring additional accounts, of obtaining product displays, of building and properly displaying such displays and of developing rapport and a good relationship with the store manager.

b. With respect to the training of these sales techniques, the defendant has utilized such aids as films, pamphlets, books and other devices.

5. *Attendance at sales conferences.*

a. There is an annual meeting conducted by the Royal Crown Cola Company of Columbus, Georgia for the route-salesmen, the route supervisors and the sales manager of the defendant.

b. The defendant conducts sales meetings on the average of twice a month. These meetings are attended by the route-salesmen, the route supervisors and the sales manager. These meetings are usually held in the morning prior to the departure of the

route-salesmen on their individual routes. Approximately four times a year, evening sales meetings are held.

c. These sales meetings are directed at the route-salesman's sales technique.

6. *Method of payment.*

a. The route-salesmen receive a base pay of $32.00 per week plus commissions. The commissions depend upon the number of cases *delivered* and the number of cases of empty bottles returned, *i.e.* sales.

7. *The proportion of earnings directly attributable to the sales effort.*

a. The annual salaries of the route-salesmen range from $8,500 to $9,500 per year to $11,000 per year. This difference in the amount of wages is accountable to the disparity in selling ability and initiative of the route-salesmen.

b. The defendant and the parent conduct sales incentive contests. Prizes are given upon the basis of achievement in the selling function of the route-salesmen—*i.e.* the obtainment of new accounts, the procurement of displays and additional shelf space, the sales of new items and other sales related activities.

c. The defendant utilizes the commission basis of pay in order to encourage the selling functions of the route-salesmen.

8. *Other relevant factors.*

a. The route-salesmen are the only sales contact between the employer and the customers.

b. The defendant and the parent conduct advertising campaigns which are intended to help the route-salesmen in their sales function.

c. The sale of carbonated beverages is a highly competitive business. The route-salesmen play a crucial role in this competition. The route-salesmen must be ever alert to the products of the competitors. They must effectively handle their own products, namely, colas, diet colas, diet lemon-lime and other assorted beverages. In handling these beverages, the route-salesmen must make decisions and choices. They must be alert to the competitive conditions. They must increase the space allocated for their products. They must obtain additional case displays. They must display their products properly. The competitive nature of the beverage industry, thus, precludes the existence of route-salesmen who just respond to the mechanical job of filling an empty space from one delivery to the next.

d. The route-salesmen are assigned certain geographical areas. They are responsible for the development of sales in these areas. The route-salesmen are required to search for new accounts in these areas.

Furthermore, with respect to the sales to the independent stores, the Court finds that, except for the initial letter of authorization of the chain stores, the sales function is the same with the independent stores as with the retail chain stores.

The Court further finds that activities such as preparing load slips, driving the truck, removing empty containers from the store for return to the defendant, are performed incidental to the sales function.

Moreover, the Court finds that the sales to the vending machines are relatively small and are not too time consuming. Thus, even if these sales can be considered nonexempt work, they do not even approach the twenty percent limitation on nonexempt work.

Consequently, from the aforementioned facts, this Court makes the following conclusions of law:

1. The Court has jurisdiction over this case pursuant to 29 U.S.C. §217.

2. The route-salesmen are employed primarily for the making of sales. They are customarily and regularly engaged in making such sales. Less than twenty percent of their time is in nonexempt work. Over eighty percent of their time is devoted to activities which are incidental to and in conjunction with their sales efforts. Thus, the route-salesmen are exempt as "outside salesmen" within the meaning of §13(a)(1) of the Act and of 29 C.F.R. §541.500.

Therefore, the Court denies the plaintiff's request for an injunction, dismisses the plaintiff's complaint, and enters judgment in favor of the defendant.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States District Judge

September 30, 1969

APPENDIX C.

Pertinent Statutory Provisions Involved.

Fair Labor Standards Act of 1938 as amended.

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to—(1) any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesmen (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)."

* * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—(2) to violate any of the provisions of section 6 or section 7 * * *.

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall

have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

Pertinent Regulations Involved From 29 C.F.R.

Sec. 541.500 Definition of "Outside Salesman".—Section 541.5 defines the term "outside salesman" as follows:

The term "employee employed * * * in the capacity of outside salesman" in Section 13 (a) (1) of the act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) making sales within the meaning of section 3 (k) of the act, or

(2) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) whose hours of work of a nature other than that described in paragraph (a) (1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

Section 541.502 Away from His Employer's Place of Business.—(a) Section 541.5 requires that an outside salesman be customarily and regularly engaged "away from his employer's place or places of business." This requirement is based on the obvious connotation of the word "outside" in the term "outside salesman." It would obviously lie beyond the scope of the Administrator's authority that "outside salesman" should be construed to include inside salesmen. Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside sales and solicitations, as explained in paragraph (b) of this section) is nonexempt.

(b) Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone (except where the telephone is used merely as an adjunct to personal calls). Thus any fixed site, whether home or office, used by a salesman as headquarters or for telephonic solicitation of sales must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. It should not be inferred from the foregoing that an outside salesman loses his exemption by displaying his samples in hotel sample rooms as he travels from city to city; these sample rooms should not be considered as his employer's places of business.

Sec. 541.503 Incidental to and in Conjunction With Sales Work.—Work performed "incidental to and in conjunction with the employee's own outside sales or solicitations" includes not only incidental deliveries and collections which are specifically mentioned in section 541.5 (b), but also any other work performed by the

employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalogue, the planning of his itinerary and attendance at sales conferences.

Sec. 501.504 Promotion Work.—(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work, or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work involved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.

(b) (1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chain store organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either along or accompanied by the jobber's salesman. In some instances the manufactur-

er's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.

(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or obtaining orders or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually enagaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the comsummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by some else.

(c) (1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under section 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled.

In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer.

(2) Another typical situation involves facts similar to those described in the preceding illustration with the difference that the jobber's salesman accompanies the representative of the company whose product is being sold. The order in this instance is taken by the jobber's salesman after the manufacturer's representative has done the preliminary work, which may include arranging the stock, putting up a display or poster, and talking to the retailer for the purpose of getting him to place the order for the product with the jobber's salesman. In this instance the sale is consummated by the jobber's salesman. The work performed by the manufacturer's representative is not incidental to sales made by himself and is not exempt work. Moreover, even if in a particular instance the sale is consummated by the manufacturer's representative it is necessary to examine the nature of the work performed by the representative to determine whether his promotional activities are directed toward paving the way for his own present and future sales, or whether they are intended to stimulate the present and future sales of the jobber's salesman. If his work is related to his own sales it would be considered exempt work, while if it is directed toward stimulating sales by the jobber's representative it must be considered nonexempt work.

(3) Another type of situation involves representatives employed by utility companies engaged in furnishing gas or electricity to consumers. In a sense these

representatives are employed for the purpose of "selling" the consumer an increased volume of the product of the utility. This "selling" is accomplished indirectly by persuading the consumer to purchase appliances which will result in a greater use of gas or electricity. Different methods are used by various companies. In some instances the utility representative after persuading the consumer to install a particular appliance may actually take the order for the appliance which is delivered from stock by his employer, or he may forward the order to an appliance dealer who then delivers it. In such cases the sales activity would be exempt, since it is directed at the consummation of a specific sale by the utility representative, the employer actually making the delivery in one case, while in the other the sale is consummated in the sense that the representative obtains an order or commitment from the customer. In another type of situation the utility representative persuades the consumer to buy the appliance and he may even accompany the consumer to an appliance store where the retailer shows the appliance and takes the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.

(4) Still another type of situation involves the company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a

requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain . . .

Sec. 541.505 Driver Salesmen.—(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs, and, if so, whether he is customarily and regularly engaged in making sales and his performance of non-exempt work is sufficiently limited to come within the tolerance permitted by §541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the Act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in §541.5. He must be a salesman by occupation. If he is, all work that he performs which is actually incidental to and in conjunction with his own sales effort is exempt work. All other work of an employee is non-exempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee

must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

(b) Employees who may perform a combination of selling or sales promotion activities with product deliveries are employed in a number of industries. Distributors of carbonated beverages, beer, bottled water, food and dairy products of various kinds, cigars and other nonfood products commonly utilize such employees, variously known as routemen, route drivers, route salesmen, dealer salesmen, distributor salesmen, or driver salesmen. Some such employees deliver at retail to customers' homes; others deliver on wholesale routes to such customers as retail stores, restaurants, hospitals, hotels, taverns, and other business establishments. Whether such an employee qualifies as an outside salesman under the regulations depends, as stated in paragraph (a) of this section, on the content of the job as a whole and not on its title or designation or the kind of business in which the employer is engaged. Hearings in 1964 concerning the application of §541.5 to such employees demonstrated that there is great variation in the nature and extent of sales activity and its significance as an element of the job, as among drivers whose duties are performed with respect to different products or different industries and also among drivers engaged in the same industry in delivering products to different types of customers. In some cases the facts may make it plain that such an employee is employed for the purpose of making sales; in other cases the facts are equally clear that he is employed for another purpose. Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes

orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. It is equally clear, on the other hand, that a routeman whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations, is not selling his employer's product or employed for the purpose of making sales but is employed for purposes which, although important to the promotion of sales to customers using the machines, plainly cannot characterize the employees as a salesman by occupation. In other cases there may be more difficulty in determining whether the employee is employed for the purpose of making sales, within the meaning of this part. The facts in such cases must be weighed in the light of the principles stated in paragraph (a) of this section, giving due consideration to the factors discussed in subsequent paragraphs of this section.

(c) One source of difficulty in determining the extent to which a route driver may actually be engaged in "making sales" arises from the fact that such a driver often calls on established customers day after day or week after week, delivering a quantity of his employer's products at each call. Plainly, such a driver is not "making sales" when he delivers orders to customers to whom he did not make the intial sale in amounts which are exactly or approximately prearranged by customer or contractual arrangement or in amounts specified by the customer and not significantly affected by solicitations of the customer by the delivering driver. Making such deliveries, as well as recurring deliveries the amounts

of which are determined by the volume of sales by the customer since the previous delivery rather than by any sales effort of the driver, do not qualify the driver as an outside salesman nor are such deliveries and the work incident thereto directly to the making or soliciting of sales by the driver so as to be considered exempt work. On the other hand, route drivers are "making sales" when they actually obtain or solicit, at the stops on their routes, orders for their employer's products from persons who have authority to commit the customer for purchases. A driver who calls on new prospects for customers along his route and attempts to convince them of the desirability of accepting regular delivery of goods is likewise engaged in sales activity and is making sales to those from whom he obtains a commitment. Also, a driver salesman calling on established customers on his route, carrying an assortment of the articles which his employer sells, may be making sales by persuading regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery of the employer's products may have been made by someone else. Work which is performed incidental to and in conjunction with such sales activities will also be considered exempt work, provided such solicitation of the customer is frequent and regular. Incidental activities include loading the truck with the goods to be sold by the driver salesman, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

(d) Neither delivery of goods sold by others nor sales promotion work as such constitutes "making sales" within the meaning of §541.5; delivery men and pro-

motion men are not employed "in the capacity of outside salesman" for purposes of section 13(a)(1) of the Act although both delivery work and promotion work are exempt work when performed by a true outside salesmen as an incident to his own sales or efforts to sell. The distinction between the making of sales and the promotion of sales is explained in more detail in the discussion and illustrations contained in §541.04. Under the principles there stated a route driver, just as any other employee, must have as his chief duty and primary function the making of sales in the sense of obtaining and soliciting commitments to buy from the persons upon whom he calls if he is to qualify under the regulations as an employee employed in the capacity of outside salesman. For this reason, a route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by the customers, including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases, is not employed in the capacity of an outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products which he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.

(e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truck drivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs non-exempt work in excess of the amount permitted by §541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.

(f) The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, routemen engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salesmen.

(1) A retail routeman who regularly calls on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied

to continue their orders for such goods but also to make such customers aware of other products which he would like to sell to them and to offer to take orders for such products or for increased amounts of the products which he is already delivering to the customer. In addition, he may call at prospective retail customers' homes for the purpose of persuading such persons to order the goods which he sells. A routeman who customarily and regularly calls on customers for these purposes and takes orders from them for products which he delivers to them, in addition to those products for which delivery has been prearranged, who is in practical effect his employer's exclusive sales contact with such customers, and whose earnings are in large part directly attributable to sales made to such customers, will be considered to be employed in the capacity of outside salesman and within the exemption provided by section 13(a)(1) of the Act if he does not perform nonexempt work in excess of the tolerance permitted by §541.5.

(2) A routeman who calls on retail stores which are among his employer's established customers may also qualify for exemption as an outside salesman notwithstanding the goods he delivers to them are of kinds and in amounts which are generally prearranged. Other facts may show that making sales is his chief duty and primary function and that he is customarily and regularly engaged in performing this function. Thus, such a routeman whose regular calls on established customers involve not only delivery of prearranged items but also active efforts to persuade such customers to continue or increase their orders for such goods and to solicit their orders for other kinds of products which he offers for sale, who also calls on retail stores which are pro-

spective customers, talks to persons who are authorized to order goods for such stores, and solicits orders from them for the goods which he sells, and whose compensation is based primarily on the volume of sales attributable to his efforts, will be considered exempt as an outside salesman if he does not perform nonexempt work in excess of the tolerance permitted by §541.5.

(3) If a routeman delivers goods to branch business establishments whose personnel have no authority to place orders or make commitments with respect to the kinds and amounts of such goods, and if the kinds and amounts of goods delivered are not determined pursuant to orders placed by the authorized personnel of the customer's enterprise as a result of sales solicitation by the routeman, it is clear that the routeman's calls on such branch establishments are not a part of the making of sales by him or incidental to sales made by him. If such work is his chief duty or primary function or if he spends a greater proportion of the workweek in such work than is allowed for nonexempt work under §541.5, such a routeman cannot qualify for exemption as an "outside salesman".

(4) A routeman who delivers to supermarkets after the enterprise has been persuaded, by a salesman of the routeman's employer, to accept delivery of goods, and whose functions other than such deliveries are primarily to arrange merchandise, rotate stocks, place point-of-sale and other advertising materials, and engage in other activities which are intended to promote sales by the supermarkets of the goods he has delivered, is not employed primarily for the purpose of selling and is not customarily and regularly engaged in making sales. Rather, he is employed primarily to deliver goods and to perform activities in the supermarkets of a na-

ture usually performed by store employees not employed as salesmen. Such a routeman is not employed in the capacity of outside salesman within the exemption provided by section 13(a)(1).

(5) Some employees are engaged in a combination of activities involving delivery, the selling of services, and the performance of the services. For example, some drivers call on customers for the purpose of selling pesticides and, if a sale is consummated, applying the pesticides on the customer's property. Such employees, like those referred to in §541.501(e), are not exempt as outside salesmen. They are primarily engaged in delivery or service functions, not in outside selling.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1448

THE KLAGES COAL AND ICE COMPANY,
d/b/a ROYAL CROWN BOTTLING COMPANY, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-16A) is reported at 435 F.2d 377. The opinion of the district court (Pet. App. 17A-28A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1970. The petition for a writ of certiorari was filed on March 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly ruled that petitioner was not exempt under the Fair Labor Standards Act from paying its routemen overtime since it failed to prove that the routemen were outside salesmen under Section 13(a)(1) of the Act.

STATUTE AND REGULATIONS INVOLVED

Section 13(a)(1) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, as well as the pertinent regulation and administrative interpretations (29 C.F.R. 541.500, 541.505), are set forth at Pet. App. 29A-44A.

STATEMENT

The Secretary of Labor brought this suit under Section 17 of the Fair Labor Standards Act, 29 U.S.C. 217, to restrain petitioner from violating Section 7 of the Act, 29 U.S.C. 207 (Pet. App. 29A) by refusing to pay overtime compensation allegedly due certain employees. Petitioner contended that the employees in question were exempted from the overtime provisions by Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), because they were "outside salesmen" as that term is defined by the Secretary. See 29 C.F.R. 541.500 (Pet. App. 30A). The district court ruled that the employees were "outside salesmen" (Pet. App. 17A-28A). The court of appeals reversed (Pet. App. 1A-16A).

1. *Petitioner's Sales and Distribution System.* Petitioner is a franchised bottler and distributor of Royal Crown Cola products, supplying chain stores, inde-

pendent stores and vending machine locations in the Akron, Ohio area (Pet. App. 18A-19A). The employees in question are routemen who deliver the products and perform other services at the retail outlets.

Approximately 60 percent of petitioner's business is derived from chain store accounts.[1] These accounts are initially obtained by petitioner's sales manager or route manager by personal contact at the chain central offices (Pet. App. 19A, 23A; App. 46, 51-52, 81, 87-88, 90, 91, 94-95, 99, 107-111, 147-148, 151-159, 292-295).[2] If the chain decides to carry Royal Crown Cola products, the central office notifies its stores, usually by letters or bulletins, that it has authorized the stocking of particular products at stated prices and on specified terms (App. 29, 54-55, 88, 109-110, 128-129, 151-152, 258, 322, 327-328, 333-334, 336-338).[3]

The individual chain stores allocate shelf or cooler space to the various beverage bottlers (Pet. App. 23A). These allocations are made by the store managers and

---

[1] Both the court of appeals and the district court concentrated discussion on sales and deliveries to chain stores because they comprised the major part of petitioner's business and the routemen's work (Pet. App. 5A, 19A).

[2] "App." refers to the Appendix in the court of appeals.

[3] Chain stores are not permitted to sell unauthorized items (App. 29, 266-267, 271-272, 280, 293-294, 321, 326, 327, 334, 337). Petitioner's officials must obtain authorization from the central office to deliver new products, packaging and container sizes to established accounts (App. 29, 54-55, 88, 109-110, 128-129, 153-154, 174-175, 258-259) and for participation by the chain stores in special "promotion[s]" which petitioner occasionally conducts (Pet. App. 23A; App. 54-56, 75, 76, 87-88, 97-98, 109-110, 153-156, 178, 229-230, 267, 268, 282-283, 289-290, 294-295, 303).

other chain personnel (App. 258, 263-265, 268-270, 273-278, 300-303). The beverage companies then are notified to deliver on a specified date (App. 258-259, 265, 277-278, 286).[4]

The routeman's primary function is to deliver a sufficient amount of stock to fill petitioner's allotted space in the chain store. He ascertains the amount required by examining the shelves; brings the proper amount into the store, sometimes actually stocking the shelves; carries away empty bottles; and presents an invoice for the amount delivered, with credit for the returned empty bottles (App. 228-229, 237-239, 244-245, 248-249, 251-252, 286-288, 291-292, 301-302, 305-306, 309).[5] Routemen are paid a weekly base rate of $32.00, plus specified amounts for each case of beverage delivered and each case of empty bottles returned.

2. *The Proceeding Below.* The district court ruled that the routemen are outside salesmen who are exempt from the Act's overtime provisions under Section 13(a)(1) (Pet. App. 29A). The court acknowledged that required authorizations for purchase of petitioner's products or promotional activities are obtained

---

[4] The store manager may reallocate space in response to consumer demand, with or without the approval of the central office, depending on chain policy (App. 250-251, 261-263, 265, 273, 278, 286, 295-296, 301-303, 309-310).

[5] Cash collections are not permitted in the chain stores. Rather, the manager, assistant manager or beverage clerk signs the invoice presented by the driver (App. 251-252, 286-287, 301-302, 310-311), and payment is made by the chain central office on a periodic basis, agreed upon by the chain representatives and petitioner's sales manager (App. 111-112, 331-332, 334).

exclusively by its sales managers or route managers (Pet. App. 23A), but it stressed that these authorizations do not designate the quantities to be purchased and that the routemen participated in the initial allocation of shelf and cooler space in the stores "[a]t times" (*ibid.*). The court also noted other sales functions of the routemen such as persuading stores to increase the space originally allocated to petitioner's products (Pet. App. 24A) and soliciting new accounts (Pet. App. 27A). The court further found that the amount of the routemen's time spent servicing vending machines did "not even approach the twenty percent limitation on nonexempt work" (Pet. App. 28A).[6]

The court of appeals unanimously reversed. It held that the district court's finding that the routemen were exempt "outside salesmen" was clearly erroneous because petitioner had not met its burden of showing, "by plain and unmistakable evidence," that "each employee is entitled to the exemption" (Pet. App. 12A). The court ruled that there had not been an adequate showing that sales functions performed by the routemen were sufficiently regular or frequent to justify classifying them as "outside salesmen" under the applicable regulations (Pet. App. 14A-15A). None of the other activities or factors on which the district court relied, the court held, altered the fact that the basic

---

[6] Regulations defining "outside salesman" require that their nonsales activity "not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer" (29 C.F.R. 541.500).

function of the routeman is not that of a salesman but a deliveryman who regularly delivers products "in amounts determined in the first instance by the customer at locations usually first obtained by [petitioner's] management employees" (Pet. App. 16A).

ARGUMENT

The petition raises primarily factual issues which do not warrant plenary review by this Court. The decision of the court of appeals was, in any event, correct.

Exemptions from the Fair Labor Standards Act are "narrowly construed against the employers seeking to assert them" and applied only in cases "plainly and unmistakably within their terms and spirit." *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Phillips Co.* v. *Walling*, 324 U.S. 490, 493. Moreover, as the court of appeals pointed out, the exemptions provided by Section 13(a)(1) apply on an individual, not a class, basis (Pet. App. 12A, 15A). See *Mitchell* v. *Williams*, 420 F. 2d 67, 69 (C.A. 8); *Triple "AAA" Company* v. *Wirtz*, 378 F. 2d 884, 887 (C.A. 10), certiorari denied, 389 U.S. 959; *Mitchell* v. *Trade Winds Co.*, 289 F. 2d 278, 282 (C.A. 5), certiorari denied, 328 U.S. 866. Under settled principles, therefore, petitioner was required to prove "plainly and unmistakably" that each of the routemen for whom it claimed the exemption was an "outside salesman" as defined in the applicable regulation. The court of appeals correctly held that the district court's ruling that petitioner had met this burden was clearly erroneous.

The regulation defines "outside salesman" as one who is "customarily and regularly" engaged in "[m]aking sales" or "[o]btaining orders or contracts" and who does not spend more than 20 percent of a normal workweek—eight hours in this case—in employment activities unrelated to such selling functions. 29 C.F.R. 541.500. In short, an outside salesman is one whose "chief duty or primary function" is selling, not the performance of "service and delivery duties." 29 C.F.R. 541.505(a). The principal activities of petitioner's routemen are in the latter category. There is no dispute that routemen occasionally perform some sales functions. On this record, however, petitioner's evidence—with respect to activities of the class and not individuals—was simply insufficient to show that sales activity was so frequent and regular that it was in fact the chief duty or primary function of the routemen.

The district court misinterpreted the significance of the fact that the specific amounts of products are determined by the routeman at the store rather than at the time the general contract with the chain is negotiated. The essentials of the selling are done at the central office level by the sales manager or the route manager; all terms and conditions of sale except the specific quantities are agreed upon at that time (App. 154, 156-159, 258, 272, 320, 322, 328, 333-334, 336, 338). It is true that the chains only authorize and do not require member stores to carry petitioner's authorized products. But the stores may not substitute the unauthorized products of a competitor, and, as a practical mat-

ter, almost invariably accept all authorized products.[7] Routemen do not, moreover, perform a significant sales function in connection with store decisions regarding initial allocation or subsequent increases in allocation of space. The record indicates that these decisions are essentially based upon projections of and changes in consumer demand and are not made in response to any sales efforts by the routemen (App. 258, 261, 263-265, 268-270, 273-278, 280-283, 287-289, 310). The routemen merely calculate the proper amount of merchandise for the designated space and supply it. The fact that the routemen are typically the only direct contact of a store (Pet. App. 26A) with petitioner thus does not convert the routemen into salesmen.[8]

---

[7] Petitioner's vice-president and general manager admitted that he could recall only three stores which had refused to carry petitioner's products (App. 133). The rare occasion when a routeman might meet resistance from a store manager and attempt to change his mind clearly would not convert him into one whose "chief duty or primary function" is to sell.

[8] The district court's finding that differences in the routemen's annual earnings are attributable to "the disparity in [their] selling ability and initiative" (Pet. App. 26A) is based solely on the unsubstantiated testimony of petitioner's route manager (App. 164-165). This finding ignores not only the fact that some routemen had significantly more chain accounts, and thus more lucrative routes, than others, but also the settled principle that such conclusory statements, unsupported by any probative objective evidence, do not satisfy an employer's burden of establishing the facts requisite to a claimed exemption. *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 206, 208-209; *Acme Car & Truck Rentals, Inc.* v. *Hooper*, 331 F.2d 442, 447 (C.A. 5); *Mitchell* v. *City Ice Company*, 273 F.2d 560, 561 (C.A. 5). See, also, *Shultz* v. *Wheaton Glass Company*, 421 F.2d 259, 267 (C.A. 3), certiorari denied, 398 U.S. 905.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
Solicitor,
BESSIE MARGOLIN,
Associate Solicitor,
CARIN ANN CLAUSS,
DONALD S. SHIRE,
Attorneys,
Department of Labor.
APRIL 1971.

☆ U.S. Government Printing Office: 1971—422-574/595